

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON DC 20268-0001**

COMPETITIVE PRODUCT LIST	)	
ADDING ROUND-TRIP MAILER	)	Docket No. MC2013-57
COMPETITIVE PRODUCT LIST	)	
ADDING ROUND-TRIP MAILER	)	Docket No. CP2013-75
(MC2013-57)	)	

**RESPONSE OF GAMEFLY, INC.,  
TO APRIL 4, 2014, USPS REPLY COMMENTS  
(April 11, 2014)**

GameFly, Inc., respectfully submits these comments in response to a claim asserted by the USPS in its April 4, 2014 “Reply Comments Submitted Pursuant to Order No. 2011.” On pages 2-7 of its April 4 pleading, the USPS asserts that Commission decisions in two previous product transfer cases under 39 U.S.C. § 3642—Docket No. MC2011-22 and MC2010-36—support reclassification of a mail product as competitive even if “some group of customers within a delivery market choose to rely, or are reliant on a postal product . . . regardless of the existence of competitive alternatives.”<sup>1</sup> These precedents, the USPS contends, warrant a finding that round-trip DVD mailer service faces effective competition.

GameFly requests leave to file this brief reply for the sake of fairness to GameFly and completeness of the record. GameFly addressed the Commission’s prior product transfer precedent in its very first comments in this docket. GameFly Comments

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<sup>1</sup> *Id.* at 3 (citing Order No. 710 in PRC Docket No. MC2011-22 (April 6, 2011), and Order No. 689 in PRC Docket No. MC2010-36 (December 15, 2010)).

(August 15, 2013) at 4. Despite filing multiple pleadings since then, the USPS never saw fit to address these precedents until its April 4 reply pleading, the very last round of pleadings scheduled by the Commission. Allowing GameFly to respond to the Postal Service's belated mischaracterization of Order Nos. 689 and 710 is an appropriate response to the Postal Service's sandbagging.

Order Nos. 689 or 710 are irrelevant to this case. In both of the earlier product transfer dockets, the record showed, and the Commission found, that FedEx, UPS and other private carriers competed with the USPS for the products at issue (lightweight commercial parcels in MC2010-36, commercial Standard Mail parcels in MC2011-22). In the present case, by contrast, the Postal Service has admitted from the outset that it faces no competition whatsoever from FedEx, UPS or any other private carrier in moving rental DVDs between DVD rental companies and subscribers. USPS Request (July 26, 2013) at Attachment A, Monteith Statement at 3. Instead, the USPS claims that its rates on DVD mail are constrained indirectly by product competition.

This is essentially the same argument that the railroad industry advanced, and the Interstate Commerce Commission accepted, in a closely analogous case involving the extent of the railroads' market dominance over the transportation of Appalachian coal to Hampton Roads, Virginia, for export:

[S]o long as coal shippers are not forced to reduce production (i.e., so long as the rail rate leaves them with a share of the revenue that covers their costs, including their costs of capital), and so long as they are not wholly excluded from any economic rents above that level, their rate is "reasonable" and there is no "abuse of market power."

*Coal Exporters Ass'n of United States v. United States*, 745 F.2d 76, 93-94 (D.C. Cir. 1984) (summarizing railroad and ICC position). The D.C. Circuit rejected the ICC's position as "unreasonable." *Id.* at 99. The ICC's interpretation, the court noted, effectively "views the distribution of economic rents between carriers with market power and shippers to be largely a matter of regulatory indifference, so long as shippers get some bare minimum," even though "the situation envisioned would be one in which market power would exist and indeed determine the distribution of rents." *Id.* at 95. Under this standard, "any shipper bargaining power, over a bare minimum, is legally sufficient." *Id.* This approach, the court held, is illegitimate because it "largely ignores the protections Congress meant to guarantee shippers." *Id.* at 99. *Coal Exporters Association*, not Commission Orders 689 and 710, is the relevant precedent here.

Respectfully submitted,

A handwritten signature in black ink that reads "David M. Levy". The signature is fluid and cursive, with the first name "David" and last name "Levy" clearly legible.

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